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No. 96-204

Supreme Court, U.S.
FILED
SEP 16 1996
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

SYDNEY KOVEN, BARBARA KOVEN, Petitioners, (also known as BARBARA A. WOOD), GARRET GALLERY, INC., a California Corporation,

Petitioners,

v.

PACIFIC-MAJOR CONSTRUCTION CO., INC., a California Corporation, DEBORAH S. GOLDS, RUTH LEWIS, BERT A NOTCH, and ROLAND ROJAS,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court Court of the State of California, Denied - August 15, 1996

PETITION FOR A WRIT OF CERTIORARI REPLY TO BRIEF IN OPPOSITION

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ADDITIONAL QUESTION PRESENTED IN RESPONDENTS' BRIEF IN OPPOSITION FOR DEBORAH S. GOLDS, BERT A. NOTCH AND ROLAND ROJAS

Whether this Court should grant certiorari in a case arising out of a construction contract when the alleged constitutional issues were purportedly not raised by petitioners in the state Court of Appeal nor addressed or ruled upon by the state courts below.

LIST OF INVOLVED PARTIES IN THE ARBITRATION OUT OF WHICH THE ISSUES IN THIS CASE AROSE UNDER SUPREME COURT RULE 12.6.

Rule 12.6 -- "All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this court, unless the petitioner notified the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below have no interest in the outcome of the petition.....All parties other than the petitioner are considered respondents.....Parties who file no document will not qualify for any relief from this Court."

Under this rule, the parties designated on page v of petitioners' opening brief herein constitute the proper disclosure of parties pursuant to Rule 29.1 and this Rule 12.6.

Opposing respondents are incorrect in their assertion that PACIFIC-MAJOR CONSTRUCTION CO., INC. is not a proper party to this matter before this Court.

The Court's attention is called to **Appendix "A"** attached to the opening brief herein wherein the arbitration award involved makes a finding concerning PACIFIC-MAJOR CONSTRUCTION CO.'s involvement as a party to the proceedings in both the lower trial court and the arbitration proceedings at pp. 1A, 2A, 3A, 4A, 5A, 6A[fn 2], 7A, 8A, 9A [wherein the arbitrator states "If either party (KOVEN or PACIFIC-MAJOR CONSTRUCTION CO., INC.) becomes involved in litigation arising out of this contract .... etc. thus designating PACIFIC-MAJOR as a participant

party to the proceedings, and wherein the arbitrator states: "....PM (PACIFIC-MAJOR) is the prevailing party as to the breach of contract claim".... are all more than ample proof to indicate that it was reasonable to deduce that the lower court and the arbitrator classified PM as a responsive party in the litigation .

Note: This Court is reminded that the California Court of Appeals and the Supreme Court of the State of California both assumed that PM was a party to the lower court litigation because they each unconstitutionally refused to review the merits of the evidence below because of the restrictions imposed by Moncharsh v. Heily & Blase (1992) 3 Cal.4th 1, 33 and Section 1286.2 and 1286.6 of the Section 1286.2(c)(d) of the California Code of Civil Procedure, as set out in petitioners' opening brief, and Appendices "B" and "C" attached to petitioners' opening brief herein.

STATEMENT OF JURISDICTION

The Statement of Jurisdiction is correct as stated in petitioners' opening brief. Respondents in opposition are incorrect in stating in their said brief that the petition for writ of certiorari is "meritless" because the alleged constitional questions were purportedly not raised by petitioners in the state Court of Appeal nor addressed by the State Courts below. This is absolutely not true:

a. Petitioners, in their opening brief on appeal to the Court of Appeal in California (2nd District, Division 6) at page 14, thereof after review the evidence from which a legal presumption could follow, states:..."This misconduct by the arbitrator is tantamount to violations of both the plaintiffs' and their attorney's Fourth Amendment rights (4th Amendment U.S.A. Constitution)(Clerk's Transcript, Vol. III, page 634:24-636:8);

b. Petitioners, in their opening brief on appeal to the Court of Appeal in California (2nd District, Division 6) at pages 27-28 states:...."The Constitution of the United States, with which the California Constitution is not inconsistent, states in Article III,§1: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish...."

Petitioners were complaining of the "abdication of judicial power" of review under the court's interpretation of the impact of Moncharsh v. Heily & Blase 3 C4th 1 on this case. (Pages 27,28 and 29 of petitioners'opening brief before the Court of Appeal.) The statement that the said impact

constituted a deprivation of procedural due proscess referred to the Clerk's Transcript of the proceedings in the lower courts at Vol. III, pagges 738,739, 740, 741 and 742, all of which are available to this court if needed.

c. At page 16 of the petitioners' petition for writ of review before the Supreme Court of California the specific issue of unconsitutionality of the Moncharsh decision is placed before the Supreme Court of the State and petitioners state at pages 17 and 18 thereof:"...The Supreme Court of the United States has held unconstitutional the state labor statute of Kansas, because it was interpreted by the Court to establish a compulsory arbitration system, and violated the Fourteenth Amendment because of the statute's deprivation of liberty and property without due process of law. (Chas. Wolff Packing Co v. Court of Industrial Relations (1923) 262 US 522, 67 L.Ed. 1103, 43 S.CT. 441...."). The issue had been directly before all of the state courts involved! Appendix "E" to the present petition corroborates this statement at pages 15E through 18E.

d.It is ludicrous and frustrating to read that opposing respondents herein claim that the constitutional issues raise in this petitition wer not presented to the lower trial and appellate courts. The simple truth of the matter was that such issues were presented, but under Moncharsh both appellate courts refused to review the merits of the case. That is precisely why we have asked this Court to intervene. This is not a meritless petition — it is one which is necessary to prevent the courts in California

from abdicating their duties under the sacred United States Constitution due process provisions.

It should be noted that each of these issues were first raised in the trial court in petitioners' Motion to Vacate the award, (Appendix "A") because, among other things the "so-called neutral arbitrator now decided in "Kangaroo Court Style" without full trial on the issue that plaintiffs (petitioners, here) and their counsel are to be assessed damages for having abused the process of the court and for malicious prosecution --- an unthinkable unconstitutional usurpation of judicial jurisdiction by a person without the qualifications to even be a neutral arbitrator, as required by law...." (Clerk's Transcript, vol. III, p 632 lines 24-28)

Each of the references above referred to are available to this Court if needed. (Superior Court of the State of California, for the County of Ventura, Koven, et al, v. Pacific-Major Construction Co., Inc., et al No. 117387.

3. THE STATE COURT'S DECISIONS ARE VALID IF, AND ONLY IF, MONCHARSH V. HEILY AND BLASE, 3 Cal 4th 1, (1992) IS A CONSTITUTIONAL INTERPRETATION OF CALIFORNIA CODE OF CIVIL PROCEDURE, §§1282.2(c)(d) and 1286.6

Both the Court of Appeal and the Supreme Court of California invoked an edict of the Moncharsh case(supra) to decline review of the merits of this case even though the award obviously constitutes a violation of petitioner's due process rights and even though there has been substantial injustice by said refusal to review the merits of the decision as contained in the award as indicated in the opening brief of petitioners. The refusal to review in a case which was submitted to arbitration either by court order, or because of a contractual clause in a salient contract, even though the award is obviously substantially unjust and does not render constitutional justice to one of the litigants, is a violation of due process as guaranteed in the Constitution.
(As contended in petitioners' opening brief.)
The court's said invokation of said presumption to permit any judicially untrained arbitrator to inflict substantial injustice on a party litigantas aforesaid, and thus eliminate that party's civil right to the due process of judicial review of the judgment that is adopted by the trial court as its own is an obvious, not to be permitted violations of due process as guaranteed by the United States Constitution and should not be condoned or permitted by our Court of Last Resort. This violation of due process was made particularly egregious by the extraordinarily restricted and circumscribed unobtainable for all practical purposes proof of the arbitrator's fraud or corruption.

CONCLUSION

The disconcerting thrust of the respondents' brief in opposition to

petitioners' petition for writ of certiorari seems to refuse discussion of thepoints and authorities set forth in the opening brief of petitioners. This is understandable since the logical sense of the matter demands that the judiciary cannot allow its own abdication of judicial authority to review all matters resulting in a judgment or a judgment which has been adopted by the courts as in this arbitration matter. The very sound of statement that an arbitration award is not subject to judicial review even though it causes substantial injustice is constitutionally repugnant. It literally cannot be swallowed by lawyers and laypersons alike that the judiciary could devise mentally gymnastic language to condone such a proposition. Justice Kennard, concurring and dissenting in Moncharsh (3 Cal.4th, at page 33) could not stomach the absurdity of the majority decision and felt constrained to say something in defense of the proposition that the judiciary should perform its duty of full review, even in such a case: He states:

> The majority holds that when a trial court is presented with an arbitration award that is erroneous on its face and will cause substantial injustice, the court has no choice but to confirm it. (Maj. opn, ante, at pp. 6, 33.) Because an order confirming an arbitration award results in the entry of a judgment with the same force and effect as a judgment in a civil action(Code Civ. Proc.,§1287.4) the majority's holding requires our trial courts not only to tolerate substantial injustice, but to become its active agent.¶ I cannot join the majority opin-

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> ion. I will not agree to a decision inflicting upon this state's trial courts a duty to promote injustice by confirming arbitration awards they know to be manifestly wrong and substantially unjust. Nor can I accept the proposition necessariy implied although never directly stated in the majority opinion, that the general policy in favor of arbitration is more important that the judiciary's solemn obligation to do justice...."

Without sounding trite and without being apologetic, it is now time for this Court of Last Resort to make itself heard and rectify this abominable appointment of arbitrators to be in a position of legal unassailability, and grant this petition for writ of certiorari, declaring the subject statute unconstitutional as interpreted by the Moncharsh decision and to reverse the Moncharsh decision as being violative of the due process provisions of the Constitution thus vacating the arbitration award and the judgment based thereupon in the subject case.

Respectfully submitted,

September 11, 1996 Lee W. Landrum
Attorney for Petitioners